DEC 3 1993

No. 93-51

In the Supreme Court of the United States

OCTOBER TERM, 1993

TIMOTHY JAY BLACKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial was sufficient to sustain petitioner's conviction for conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-69) is reported at 985 F.2d 1248.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1993. A petition for rehearing was denied on April 5, 1993. The petition for a writ of certiorari was filed on July 6, 1993 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B), and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 144 months' imprisonment. The court of appeals reversed petitioner's money laundering conviction but affirmed his drug conspiracy conviction. Pet. App. 1-55.

1. At trial, the government sought to show that petitioner and his partner, Odas White, were part of a large-scale cocaine distribution network headed by Walter Dennis Purser and John Arrendell that was centered in Charlotte, North Carolina, and Rock Hill, South Carolina. In 1987, Purser met White through Dennis George, one of Purser's primary distributors in South Carolina. Over a nine-month period from the summer of 1987 through early 1988, Purser sold White approximately 18 kilograms of cocaine. Gov't C.A. Br. 7-8.

Petitioner, whose nickname was "Tiny," was a member of the Hell's Angels motorcycle club. In 1988, Terry Norman, another member of the club who had purchased a kilogram of cocaine from petitioner in 1986, arranged to purchase another kilogram from petitioner in Winston-Salem, North Carolina. On that occasion, petitioner gave Norman one-half kilogram, and he told Norman that his "partner" would deliver the rest. Some time thereafter, White delivered the other one-half kilogram to Norman. According to Norman, White was a Hell's Angels associate who was often with petitioner. Norman paid

petitioner $13,000 in cash for the kilogram of cocaine. As an additional payment, Norman gave petitioner eight ounces of methamphetamine, which petitioner and his girlfriend, Patricia Richards, picked up at Norman's residence in Davidson County, North Carolina, in August 1989. At that time, petitioner was driving a truck and pulling a blue and white boat that had a cabin under the deck with a sleeping area. Pet. App. 14-15, 25-26; Gov't C.A. Br. 14-16.

In late 1988, George was convicted and imprisoned on unrelated charges. Before he went to prison, George gave White's telephone pager number to Darrell McKamey, one of his mid-level distributors in the Rock Hill area, and he told McKamey that "Odas" could supply him with cocaine. Thereafter, McKamey obtained cocaine from White on a number of occasions. Gov't C.A. Br. 9-10.

At that time, McKamey was employed at Lake Wylie Marina as a boat salesman. In March 1989, White came to the marina, and he told McKamey that he had a friend who was looking for a small cabin cruiser. McKamey showed White a 22-foot Sea Ray Sundancer boat, and White said he would pass the information along to his friend. Several weeks later, White returned to the marina with another person.[1] After White and McKamey walked off by themselves, White offered to give McKamey $30,000 for the Sea Ray Sundancer boat, but he asked McKamey to pur-

[1] McKamey, who was a government witness at trial, testified that petitioner looked "a lot like" the person who accompanied White that day. On cross-examination, McKamey reiterated that petitioner "look[ed] a lot like him," but stated that he was "not 100 percent sure." Gov't C.A. Br. 11 & n.2; C.A. App. 398.

chase the boat in his own name. White also proposed to "front" McKamey one kilogram of cocaine. McKamey initially declined the offer. Pet. App. 11-12; Gov't C.A. Br. 9, 10-11.

A few days later, McKamey decided to accept White's offer, and he went to White's restaurant in Tega Cay, South Carolina. There, White gave McKamey $30,000 in cash wrapped in a brown paper bag as the purchase price for the boat. Several days later, McKamey purchased the boat, titled it in his own name, and delivered it to White in Tega Cay. One week later, McKamey met White in Rock Hill, where White gave him the kilogram of cocaine. After selling the cocaine to customers in the Rock Hill area, McKamey paid White for the cocaine. McKamey later received another kilogram of cocaine from White. Pet. App. 11-12; Gov't C.A. Br. 11-12.

McKamey began cooperating with law enforcement agents in December 1989, and he tape-recorded a meeting with White on March 23, 1990. During that meeting, White told McKamey that he was a target of grand jury investigations in North Carolina and South Carolina, and they discussed what to tell government agents who asked about the boat that McKamey had purchased. White also told McKamey that he had not seen the boat in a long time. After McKamey asked "[w]here is he keeping it," White and McKamey discussed a third person who had "split up" with his wife. At the end of the meeting, McKamey paid White $2,500 that he owed in connection with an earlier cocaine transaction. Pet. App. 12-13; Gov't C.A. Br. 12-13.

On April 10, 1990, McKamey tape-recorded another meeting at which he purchased five ounces of cocaine

from White. During that meeting, McKamey and White again discussed the government's investigation of the boat that McKamey had purchased for White. White told McKamey that government agents had "subpoenaed Tiny's girlfriend." He also told McKamey that Tiny was a member of the Hell's Angels. White said that a Hell's Angels member from Winston-Salem had "rolled" and told government agents about the boat. When McKamey asked whether the Hell's Angels member was a friend of Tiny, White replied that he was. White also said that all that the Hell's Angels member knew was that Tiny had a boat that he had brought from Charlotte. Pet. App. 13-14; Gov't C.A. Br. 13-14.

For the period between January 1989 and September 1990, telephone records showed 27 calls from White's restaurant to petitioner's residence, 30 calls from telephones registered to petitioner to White's restaurant, and 134 calls from telephones registered to petitioner to White's beeper number. In addition, an Alcohol, Tobacco, & Firearms (ATF) agent testified that he had seen petitioner and White together at a Hell's Angels motorcycle rally in April 1990 and at a funeral in July 1990. Pet. App. 15; Gov't C.A. Br. 16-17.

In petitioner's defense, his wife, Kathy Blackwell, testified that petitioner owned a red and white boat. On cross-examination, Kathy acknowledged that she and petitioner had been separated between October 1989 and June 1990 and that petitioner had a girl friend named Tricia Richards during that period. Pet. App. 16; Gov't C.A. Br. 18.

In rebuttal, an ATF agent testified that Patricia Richards had stated during an interview in February

1990 that petitioner was pulling a blue boat when she and petitioner had visited Norman in Winston-Salem. Pet. App. 16; Gov't C.A. Br. 18-19.

2. The court of appeals reversed petitioner's money laundering conviction. Pet. App. 18-24. The court found that the evidence at trial was insufficient to sustain that conviction because of "the absence of specific evidence identifying the boat that White paid for after it was bought, identifying [petitioner] as the possessor or owner of this boat, showing that the money White used was really [petitioner's], and showing that this money was the product of drug transactions[.]" *Id.* at 23. The court concluded that the two tape-recorded conversations between McKamey and White were "too inconclusive to bear the weight that the government places on them[]," because "neither McKamey nor White stated who the 'he' was who was keeping the boat." *Id.* at 21.

The court of appeals concluded, however, that the evidence was sufficient to sustain petitioner's drug conspiracy conviction. Pet. App. 24-28. The court found that Norman's testimony that he engaged in a cocaine transaction with petitioner in 1988 demonstrated petitioner's participation in the conspiracy, because that testimony established that White and petitioner were partners. *Id.* at 25-26. The court noted, in addition, that "the large number of phone calls logged between phone numbers controlled by White and [petitioner] supports the view that the two were partners." *Id.* at 27. The court rejected petitioner's claim that his cocaine transaction with Norman in Winston-Salem was not part of the conspiracy charged in the indictment. Since "the [district] court correctly charged the jury on the possibility that

there were multiple conspiracies[,]" the court observed that "the jury apparently determined that [petitioner's] drug activities were part of the larger, single conspiracy in Rock Hill and Charlotte." *Id.* at 27-28. The court concluded that "[t]he evidence does allow the jury to have drawn the inference that White's participation as [petitioner's] 'partner' meant that [petitioner] was a part of the charged conspiracy." *Id.* at 28.[2]

ARGUMENT

Petitioner contends that the court of appeals erred in holding that the evidence at trial was sufficient to sustain his drug conspiracy conviction. He argues (Pet. 10-17) that the court of appeals improperly affirmed the conviction based on a theory that was not presented to the jury at trial. That contention does not warrant this Court's review.

As petitioner points out (Pet. 10-11), this Court noted in *McCormick* v. *United States*, 111 S. Ct. 1807, 1815 n.8 (1991), that "[a]ppellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the

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[2] Judge Luttig dissented from the reversal of petitioner's money laundering conviction. Pet. App. 56-69. In his view, "[t]he underlying error of the majority * * * is that it refuses to permit the jury to make any inferences at all from the taped conversations between White and McKamey." *Id.* at 58. Judge Luttig explained that "[w]hen the evidence from the transcripts of the conversations between White and McKamey is properly considered, it is apparent that for each fact as to which the majority asserts that the evidence was insufficient, there is substantial, and in most instances overwhelming, record support." *Id.* at 60. Judge Luttig concurred in the affirmance of petitioner's drug conspiracy conviction.

theory were presented to the jury." In this case, however, the court of appeals did not affirm petitioner's drug conspiracy conviction on a theory that was not presented to the jury. The government's theory at trial was that petitioner and White were partners in the distribution of cocaine for the Arrendell-Purser enterprise that was centered in Charlotte and Rock Hill.[3] Although the charge of money laundering "rested solely upon the Government's contention that Petitioner provided money and cocaine in 1989 to White" to finance White's purchase of a boat from McKamey, see Pet. 4, the evidence of petitioner's role in the purchase of the boat was only part of the government's case against petitioner on the conspiracy charge. That charge rested on a considerable amount of additional evidence linking petitioner to the Arrendell-Purser conspiracy. The government introduced Norman's testimony that petitioner had stated, after delivering half a kilogram of cocaine to Norman in Winston-Salem, that his "partner" would deliver the rest. White then delivered the remaining half kilogram of cocaine to Norman. As the court of appeals noted, Pet. App. 25, the undisputed evidence at trial showed that White distributed cocaine for the Purser-Arrendell enterprise. Thus, the evidence that petitioner and White were partners in the delivery of the kilogram of

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[3] Contrary to petitioner's suggestion (Pet. 7), the fact that the government may have stated at oral argument in the court of appeals that petitioner's two convictions should stand or fall together did not bar the court of appeals from making its own determination as to whether the evidence was sufficient to sustain each conviction. Cf. *Garcia* v. *United States*, 469 U.S. 70, 78-79 (1984).

cocaine to Norman supported a reasonable inference that the petitioner and White were joint participants in Purser-Arrendell drug distribution conspiracy during the same time period.[4]

It is well settled that, in evaluating the sufficiency of the evidence to sustain a conviction, all of the

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[4] As the court of appeals noted (Pet. App. 27), the district court instructed the jury on the possibility of multiple conspiracies. For that reason, this case is unlike *McCormick* v. *United States*, 111 S. Ct. at 1814-1815 & n.8, in which the court of appeals had failed to examine the sufficiency of the evidence in the context of the jury instructions that were given at trial.

The question whether there was sufficient evidence to show that petitioner willfully joined the conspiracy depends on the totality of the evidence in this case and is not limited to evidence that petitioner engaged in a single transaction with White, who was a known member of the conspiracy. Thus, there is no merit in petitioner's claim (Pet. 18-20) that the decision here conflicts with *United States* v. *Durades*, 607 F.2d 818 (9th Cir. 1979), in which the court of appeals found that evidence that the defendant transacted business with a key figure in a large drug conspiracy was insufficient to sustain his conspiracy conviction in the absence of any additional circumstances suggesting that the defendant knowingly participated in the conspiracy. Likewise, the decisions in *United States* v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990), and *United States* v. *Sophie*, 900 F.2d 1064 (7th Cir.), cert. denied, 498 U.S. 843 (1990), stand only for the proposition that, in order to link a defendant to a conspiracy, there must be some evidence that the defendant was aware of the conspiracy and "embraced [its] objective." 900 F.2d at 1081. Petitioner's frequent contacts with White, coupled with the evidence of his participation with White in the Norman transaction and the tape-recorded evidence suggesting petitioner's role in White's purchase of the boat, would permit a jury to infer that petitioner was a member of the larger drug conspiracy in which White took part.

evidence at trial is viewed in the light most favorable to the government, with all reasonable inferences and credibility determinations made in support of the jury's verdict. The jury's verdict must be sustained if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see also *Wright* v. *West*, 112 S. Ct. 2482, 2492-2493 (1992); *Burks* v. *United States*, 437 U.S. 1, 17 (1978); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Here, even if the evidence of petitioner's role in the purchase of the boat was insufficient to sustain his money laundering conviction, the jury could still have believed that that evidence, taken together with the testimony concerning the Norman transaction and the telephone logs, was sufficient to prove that petitioner was a member of the Arrendell-Purser conspiracy. The court of appeals' decision to sustain petitioner's conspiracy conviction therefore did not involve any "change" in the theory underlying the government's charge of conspiracy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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